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## County of Sacramento

April 22, 2013

Cindy Messer  
Delta Plan Program Manager  
Delta Stewardship Council (DSC)  
980 Ninth Street, Suite 1500  
Sacramento, California 95814

### **RE: Comments on the “Modified Text” of Delta Plan’s Proposed Regulations**

Dear Ms. Messer:

Pursuant to Government Code section 11340 *et seq.* (Administrative Procedures Act), Sacramento County respectfully submits a second set of comments on the Delta Plan regulations, proposed to be incorporated in Title 23 (Waters), Division 6 (Delta Stewardship Council) of the California Code of Regulations (CCR). To assist you and your staff, we are providing our previous January 14, 2013 letter with *italicized* comments that indicate whether our previous comment/concern was addressed or additional clarification and/or correction is needed. In cases where the proposed regulatory language remains unchanged or amended, we respectfully reaffirm our prior comments.

1. Many of the “regulations” are characterized as policies, rather than regulations. While the provisions arguably provide policy direction for interpreting the Delta Reform Act (Act), they do not provide the type of clarity or objective parameters that readily permit implementation of either the Act or the Delta Plan. The provisions merely reiterate the policies contained in the November 2012 Final Draft Delta Plan. They do not elaborate upon, define, clarify or otherwise explain or set standards. To the contrary, the “regulations” will likely necessitate further clarification and regulation.

*Sacramento County notes that the April 4, 2013 revisions to the proposed regulations include a host on of language changes, but nothing so substantial to “provide the type of clarity or objective parameters that readily permit implementation of either the Act or the Delta Plan”.*

2. The regulations substantially focus on only one of the coequal goals, the provision of a more reliable water supply, with little to no recognition of the other coequal goal of protection, restoration, and enhancement of the Delta ecosystem. Such emphasis on the one goal to the exclusion of the other renders the proposed regulations inconsistent with the Act.

*“Managing Tomorrow’s Water Today”*

*The April 4<sup>th</sup> revisions are absent changes that specifically address our finding.*

3. The definition of “coequal goals” in Section 5001(e) is not actually a definition of those goals. It does no more than reiterate and duplicate Public Resources Code section 85054. The so-called definition relates exclusively to the conceptual manner of achieving the co-equal goals. However, there is no linkage to actual implementation of the coequal goals. Furthermore, the strategies identified as protecting and enhancing the values of the Delta are conceptual and undefined. For example, in Section 5001(e) (3), what is meant by “encourage recreation and tourism?” What performance measure, standard or criteria is being adopted?

*The coequal goals definition is now cited in Section 5001(h) of the April 4<sup>th</sup> revisions (page 2). However, the revised language does not address our finding regarding expanding the coequal goals definition, and further this regulation is absent a much needed performance standard or clarification of the term “encourage”.*

4. In Section 5001(g), the statutory citation should be to the Section 12220 of the Water Code, not the Public Resources Code.

*Revised Section 5001(k) (page 4 of the April 4<sup>th</sup> revisions) still cites Public Resources Code, not Water Code. Interestingly, the correct cite was included in the March 18, 20013 redline version of the regulations, but not carried over to the April 4<sup>th</sup> revisions.*

5. The definition of “encroachment” in Section 5001(i) (and related provisions of the draft regulations) is overly broad, duplicative and unnecessary. It is unnecessary because State law already vests the Central Valley Flood Protection Board (and local governments, under the Cobey-Alquist Act) with comprehensive regulatory authority to address encroachments in floodplains. The definition is also overbroad because it includes literally every activity that could occur in a floodplain. Conceivably even routine agricultural practices such as planting crops, removing invasive weeds and installing wells would constitute encroachments under this definition.

*The April 4<sup>th</sup> revisions are absent changes to Section 5001(n) (page 4) that specifically address our finding.*

6. The definition of “floodway” in Section 5001(l) is duplicative of other provisions of state law and, therefore, unnecessary. For example, regulations adopted by the Central Valley Flood Protection Board define both “designated floodway” and “floodway.” See 23 Cal.Code Regs. §4. A parallel definition of this term is unnecessary, as is a duplicative regulatory process relating to encroachments and other activities in floodways.

*Floodway is still defined/referenced in Section 5001(t) of the April 4<sup>th</sup> revisions (page 5).*

7. To the extent that the draft regulations are utilizing CEQA standards and definitions, those regulatory provisions should be cross-referenced. For example, Section 5001(k) defines the term “feasible.” A definition of that term already exists in the CEQA Guidelines (14 CCR § 15364). As such, the definition is duplicative.

*The April 4<sup>th</sup> revisions (page 4) are absent changes to Section 5001(p) that specifically address our finding.*

8. In Section 5001(t) and (u), the definitions of “urban area” and “urbanizing area” are consistent with Government Code 65507(j) and the terminology used in the 2012 Central Valley Protection Plan (CVFPP), it conflicts with the definition of “urban” set forth in the Delta Protection Commission’s Land Use Resource Management Plan (LURMP). This inconsistency needs to be resolved in order avoid implementation issues when applying the new development and flood protection regulations to the unincorporated (legacy) Delta communities.

*Definitions of “urban area” and urbanizing area” are now found in Sections 5001(ee) and 5001(ff) of the April 4<sup>th</sup> revisions (page 7). Given that the term “urban” was deleted from Sections 5010 and 5013, the Delta Plan’s regulations no longer need to define “urban area” or “urbanizing area”, and therefore should be deleted.*

9. With respect to Section 5003, the term “covered action” is already defined in state law. The draft regulatory definition is duplicative of Water Code section 85057.5.

*Section 5003 was deleted from the April 4<sup>th</sup> revisions. A shorter version of the covered action definition is now included in Section 5001(j) (pages 3 and 4), consistent with Water Code section 85057.5.*

10. Section 5003(c) requires that covered action determinations must be “reasonable, made in good faith and consistent with the Delta Reform Act and this chapter.” However, it is not appropriate to require that the local legislative body act reasonably or in good faith in making its determination. The sole issue is the correctness of the legislative body’s determination that an activity constitutes a covered action and is consistent with the Act. Subjective inquiries into the “good faith” or “reasonableness” of public agency decision makers is barred. See e.g. *Board of Supervisors v. Los Angeles Co.* (1995) 32 Cal.App.4<sup>th</sup> 1616; *Co. of Los Angeles v. Superior Court* (1975) 13 Cal.3d 721.

*With the deletion of 5003, the “act reasonably or in good faith” language is no longer part of the proposed regulations..*

11. Section 5003(b)(2)(D)(ii) needs to define the term “small-scale habitat restoration projects.”

*Section 5001, subdivision (dd), paragraph (4), subparagraph (B) of the April 4<sup>th</sup> revisions (page 7) now defines “small scale” relying on CEQA Guidelines section 15333.*

12. Section 5004(b)(2) provides that covered actions not exempt from CEQA must include feasible mitigation measures identified in the Delta Plan’s Program EIR or substitute measures. However, under CEQA, mitigation is only required for significant impacts. Absent clarification, this provision legislates an additional CEQA mandate. In addition, mitigation measures should be dictated by CEQA, not by a separate mitigation requirement imposed by the Act.

*Section 5004(b)(2), is now cited in Section 5002(b)(2) (page 9). However, the regulatory language remains unchanged and does not specifically address our finding.*

13. Section 5004 is titled contents of certifications of consistency, but neither it nor any of the other draft regulations provide any guidance or criteria for determining whether and to what extent a project that is only partially consistent with one of the coequal goals is “on whole” consistent for purposes of Section 5004. Nor does Section 5004 provide any guidance, standard or regulation relating to the time of the certificate of consistency.

*Again, Section 5004, now cited in Section 5002 was re-titled to “Detailed Findings to Establish Consistency with the Delta Plan”. However, the April 4<sup>th</sup> revisions do not specifically address our finding. For example, no additional “guidance” or “standard” is provided.*

14. Section 5012 limits “new urban development” to certain locations that are already developed or designated for development in local general plans. The intended meaning of the term “urban development” is far from clear. The draft regulations already define the term “urban area” in such a manner that the unincorporated Delta towns of Clarksburg, Courtland, Hood, Locke, Ryde and Walnut Grove are excluded. However, the term “new urban development” is using the term “urban” as a classification of a particular type of land use (residential, commercial, industrial) without regard to population or density. A broad interpretation of the term “new urban development” would encompass even the construction of a single residence or commercial facility. However, other draft regulations (Section 5015 regulating residential subdivisions of five or more lots) would be unnecessary in such case. What then is the level of “urban development” that is within the scope of Section 5012?

*We note the term “urban” was deleted from Section 5010 (pages 14 and 15) and replaced with “residential, commercial and industrial development”. To better reflect the intent of Chapter 5 of the Delta Plan and remove all references to the term urban, we suggest the re-titling of Section 5010. We recommend replacing “Locate New Urban Development Wisely” with “**Criteria for Compatible and Sustainable Land Use Development**”.*

15. Section 5015 requires 200 year flood protection for certain residential developments of five or more parcels. This requirement is inconsistent with existing statutory provisions regarding only 100 year flood protection. It conflicts with existing Government Code section 65865.5 wherein the State clearly established that development in non-urban areas (under 10,000 residents) must meet the FEMA 100-year standard and that the 200-year standard is applied to urban areas. Under the current Sacramento County General Plan, neither these towns nor the entirety of the rural Delta could ever reach a population greater than 10,000. Currently, the State has not established 200-year floodplain elevations and according to the Central Valley Flood Protection Plan, has no intention of doing so for non-urban areas. Further FEMA does not utilize and has not established 200-year floodplain maps or elevations. Therefore, it is unclear what 200-year standard is intended in the draft regulations, how and when it is to be established and how the proposed regulation could be applied, lacking any such definition of the standard.

*We note that revisions to Section 5013 (page 18) resulted in the deletion of the 200-year provision. However, the County remains concerned that the revised regulatory language will still be problematic to implement and enforce as a local flood control/management standard. As an alternative we propose the following:*

***§ 5013. Require Flood Protection for Residential Development in Rural Areas.***

***(a) New residential development of five or more parcels shall ~~provide for a minimum of 200-year flood protection, such as through the use of adequate levees or flood proofing, if it be~~ protected through floodproofing, as defined in Section 5001(s), to a level 12 inches above the 100 year base flood elevation, plus sufficient additional elevation to protect against the local impacts of a 55-inch rise in sea level rise, measured at the Golden Gate, unless the development is located within outside of:***

- (1) Areas that city or county general plans, as of the date of the Delta Plan's adoption, designate for development in cities or their spheres of influence;*
- (2) Areas within Contra Costa County's 2006 voter-approved urban limit line, except Bethel Island;*
- (3) Areas within the Mountain House General Plan Community Boundary in San Joaquin County; or*
- (4) The unincorporated Delta towns of Clarksburg, Courtland, Hood, Locke, Ryde, and Walnut Grove, as shown in Appendix 7.*
- (5) The incorporated City of Isleton.***

16. **NEW COMMENT:** Revised Section 5015(a)(2) references the "The Cosumnes River-Mokelumne Confluence, as defined by the North Delta Flood Control and Ecosystem Project (McCormack-Williamson)". For a better understanding of this regulation, which will lead to more seamless adherence and implementation at the local level, Chapter 7 the Delta Plan should include a map that specifically identifies this area.

Ms. Cindy Messer  
Delta Plan Draft Regulations, as Modified on April 4, 2013  
April 17, 2013  
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Sacramento County appreciates the opportunity to share our second round of comments on the Delta Plan's proposed regulations. As the stated numerous times in our comments on the Delta Plan, the EIR, and the rulemaking package, Sacramento County is committed to developing and maintaining a collaborative partnership with DSC staff. Please contact me (916.874-8913), or Don Thomas, Senior Planner (916.874.5140) should you require additional information or have follow-up questions about the County's comments.

Sincerely,



Michael L. Peterson  
Director, Sacramento County Water Resources

cc: Rob Leonard, Chief Deputy County Executive, Sacramento County  
Michele Bach, Office of the County Counsel, Sacramento County  
Cathy Hack, Environmental Coordinator, Department of Community Development,  
Sacramento County  
Don Thomas, Senior Planner, Water Resources, Sacramento County